

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	CASE NO. 04-90866 -JB
	:	
BILL J. MILLER,	:	CHAPTER 13
	:	
Debtor.	:	

ORDER

On October 31, 2005, debtor filed a *pro se* pleading entitled "Motion To Retain Home." The record does not reflect any service by the debtor on the Chapter 13 Trustee or any other parties in interest, including the active creditors in this case, Bank of America Mortgage, L.L.C. ("BA Mortgage") and the United States of America for the Internal Revenue Service. This motion appears to be a motion to reconsider two orders entered on October 20, 2005, an Order dismissing the case and an Order declaring that the foreclosure sale which took place on February 3, 2004 is valid to the extent it is otherwise valid under state law.

Debtor is a self-employed landscaper with eight children. Debtor has filed many previous cases, and this case was pending a long time without a confirmable plan. Debtor filed his first Chapter 13 case *pro se*, Case No. 97-69426-JB, on May 28, 1997, and it was dismissed prior to confirmation on August 15, 1997. Debtor's second Chapter 13 case, Case No. 97-79752-JB, was filed on November 3, 1997, by counsel at Clark & Washington, P.C., and it was dismissed prior to confirmation on January 16, 1998. Debtor filed his third Chapter 13 case, Case No. 98-66182-JB, through counsel Dorothy Coprich and Kenneth Mitchell, on April 6, 1998, and obtained a discharge on April 10, 2000. Debtor filed a fourth

Chapter 13 case, Case No. 02-91238-JB, through counsel Kenneth Mitchell, on February 4, 2002, but the case was dismissed prior to confirmation on August 24, 2002. Debtor's fifth Chapter 13 case, Case No. 02-99757-JB, was filed on September 25, 2002, through counsel Kenneth Mitchell, and the Court dismissed the case with prejudice for one hundred and eighty (180) days on March 14, 2003. During the period that debtor was ineligible to file bankruptcy, debtor's spouse Sylvia D. Miller filed a Chapter 13 case, Case No. 03-94836-JB, on May 5, 2003. Her case was also dismissed with prejudice on December 24, 2003, making her ineligible to file bankruptcy for one hundred and eighty (180) days.

The debtor filed this case, his sixth, *pro se* on February 2, 2004. The debtor has been given a number of chances and sufficient time to propose a feasible plan in this case. On February 3, 2004, one day after debtor filed this case, BA Mortgage foreclosed on the debtor's real property located at 3280 Herrenhut Road, Lithonia, GA 30038 (the "Property"). BA Mortgage had no knowledge that the debtor had filed this sixth case at the time the foreclosure sale was conducted. On March 15, 2004, shortly after learning that the debtor had filed this case, BA Mortgage filed a motion for relief from the automatic stay and to annul the stay and validate the foreclosure sale. A hearing on BA Mortgage's motion was scheduled for April 13, 2004, at 9:30 a.m. and the confirmation hearing was set for April 13, 2004, at 1:00 p.m. Debtor failed to attend the April 13, 2004 hearing on BA Mortgage's motion, and the Court granted BA Mortgage's motion as unopposed and directed counsel for BA Mortgage to prepare the Order. Mr. Miller appeared at the confirmation hearing. After hearing from the Trustee and Mr. Miller, the Court sustained the Trustee's objections and directed a dismissal of the case.

On April 22, 2004, debtor retained Kenneth Mitchell, who had represented him in previous cases, and Mr. Mitchell filed an emergency motion to reimpose the stay and vacate any dismissal of the case. The motion alleged that debtor failed to attend the April 13, 2004 hearing on BA Mortgage's motion because he had not received notice. In support of this motion, debtor attached a copy of the certificate of service which showed the notice for the April 13, 2004 morning hearing, served by counsel for BA Mortgage, had been mailed to an incorrect address. After considering debtor's emergency motion, the Court scheduled a hearing for May 11, 2004.

At the May 11, 2004 hearing, David Whitridge appeared on behalf of BA Mortgage, James H. Bone, the Chapter 13 Trustee, appeared, and Kenneth Mitchell appeared on behalf of the debtor. The parties reached an agreement to reimpose the stay, and an order was entered three weeks later on May 28, 2004. Among other things, the order (hereinafter "Interim Order") required the debtor to (1) file a Chapter 13 plan, Schedules and Statement of Financial Affairs on or before May 17, 2004; (2) pay BA Mortgage \$1,001.82 in certified funds on or before 4:30 p.m. on May 14, 2004; and (3) pay \$1,100.00 to the Chapter 13 Trustee on or before the close of business on June 16, 2004. If debtor complied with these conditions, the Trustee was directed to notice and reset the § 341 meeting and confirmation hearing. BA Mortgage's motion would be heard with the confirmation hearing. Failure of the debtor to comply would result in dismissal of the case and a granting of BA Mortgage's motion. Debtor complied with the provisions of the Interim Order, and the confirmation hearing and hearing on BA Mortgage's motion to validate foreclosure sale were scheduled for September 14, 2004.

At the September 14, 2004 hearing, debtor appeared and was represented by Kenneth Mitchell, Melissa Carperos appeared on behalf of the Chapter 13 Trustee, and Mathew Schuh appeared on behalf of BA Mortgage. Counsel for the Chapter 13 Trustee stated that the debtor had not made any payments to the Chapter 13 Trustee since the \$1,100.00 payment required by the May 28, 2004 Interim Order and she recommended dismissal, because the debtor, in order to pay the claims by the IRS and BA Mortgage, would have to pay approximately \$3,400.00 a month in Chapter 13 Trustee payments. The Trustee argued that the plan was not feasible given debtor's current income. Counsel for BA Mortgage stated that debtor had missed seven (7) post-petition mortgage payments for a post-petition arrearage of \$7,598.81, and that debtor's total arrearage was now \$36,730.37, including thirty-one (31) unpaid pre-petition mortgage payments.

The debtor testified that he had been confused by the Interim Order, and that he had missed five (5) post-petition mortgage payments, not seven (7) payments as indicated by BA Mortgage's records. Debtor testified that his employment situation had improved and he felt certain he could make up the arrearages. Mr. Miller had \$3,400.00 with him, and the Chapter 13 Trustee agreed that these funds should go directly to BA Mortgage. Counsel for the debtor acknowledged that the current plan was unworkable and stated that he was in the process of negotiating with the IRS to reduce its claim. Counsel stated that he expected to complete the negotiations with the IRS and file a confirmable plan shortly.

As a result of the September 14, 2004 hearing, the Court entered an Order on November 2, 2004 (hereinafter "Second Interim Order"), which directed debtor to pay the Chapter 13 Trustee \$3,035.00 by October 29, 2004 and \$3,400.00 to BA Mortgage by

September 24, 2004. The Second Interim Order also required debtor to make timely Chapter 13 plan payments and his regular monthly post-petition mortgage payments to BA Mortgage.

On December 28, 2004, the Chapter 13 Trustee filed a status report stating that the debtor had failed to comply with the Second Interim Order and was \$5,750.00 behind in payments to the Chapter 13 Trustee. The Chapter 13 Trustee requested that the case be dismissed with prejudice. On January 4, 2005, debtor filed a response stating that he had paid the Chapter 13 Trustee \$4,900.00 on December 31, 2004 and would be able to pay the remaining \$850.00 in a timely manner. The case was scheduled to come before the Court for a hearing on the Trustee's status report and the debtor's response on February 22, 2005. At the call of the calender, Mr. Mitchell indicated that he would file an amended Chapter 13 plan, Schedules, and Statement of Financial Affairs by March 15, 2005. He and the Trustee agreed to continue the hearing on the status report. Mr. Whitridge attended the hearing on behalf of BA Mortgage and stated that he had no objection to the matter being continued.

On March 15, 2005, debtor filed an amended Chapter 13 plan, Schedules, and Statement of Financial Affairs. However, again the proposed plan payments were insufficient to cover the claims of BA Mortgage and the IRS. On March 29, 2005, the case was scheduled to come before the Court for confirmation of the Chapter 13 plan and on BA Mortgage's motion to validate foreclosure sale. Only the Chapter 13 Trustee appeared, but he announced that the parties had agreed to continue the matter again in order to allow the debtor more time to resolve the IRS claim. The Trustee also stated that debtor had agreed to file an objection to the IRS claim which he did on March 31, 2005. On June 17, 2005, the Court entered an order that required debtor to be current on his mortgage and plan payments

at the continued confirmation hearing. The Order provided that if the debtor was current, BA Mortgage would withdraw its motion to validate the foreclosure sale; if the debtor was not current, the Court would enter an order validating the foreclosure sale.

The continued hearing on confirmation and on BA Mortgage's motion to validate foreclosure sale was scheduled for August 23, 2005. Counsel for BA Mortgage, the Chapter 13 Trustee, Mr. James H. Bone, and debtor's counsel, all appeared at the hearing, but the debtor did not appear. At the hearing, Mr. Bone stated that the debtor was behind on his plan payments by approximately \$6,295.00. Counsel for BA Mortgage stated on the record that the debtor was behind by approximately \$9,263.05 in post-petition payments. Counsel for the debtor, Ken Mitchell, did not dispute these statements or the amounts, but instead argued that his client had indicated to him that he intended to pay the missed plan payments and post-petition arrearages in full. The Court gave debtor until September 23, 2005, to pay in full the post-petition arrearage to BA Mortgage and the payments due under the Chapter 13 plan. The Order (hereinafter "Third Interim Order"), was entered on September 2, 2005, and was very specific that in the event debtor failed to comply, this case would be dismissed with prejudice as to all chapters. In addition, the Third Interim Order reset the hearing on confirmation of the Chapter 13 plan and BA Mortgage's motion to validate foreclosure sale one more time to September 27, 2005. The Certificate of Service shows the Third Interim Order was served on debtor, debtor's spouse, and debtor's counsel as well as the other parties in interest.

At the September 27, 2005 hearing, the Chapter 13 Trustee, James H. Bone, and Mathew Schuh, counsel for BA Mortgage, appeared and announced that debtor had failed

to comply with the Third Interim Order. Neither the debtor nor his attorney appeared at the hearing, but Mr. Bone represented that the debtor's attorney had told him via telephone that he had no opposition to a dismissal with prejudice as the debtor could not pay the amounts required by the Third Interim Order. Accordingly, on October 20, 2005, the Court entered two Orders: (1) an order dismissing this case with prejudice, rendering the debtor ineligible to file for bankruptcy relief under any chapter of Title 11 for one hundred-eighty (180) days, and (2) an Order granting BA Mortgage's motion to annul the automatic stay and thus validate the February 3, 2004 foreclosure sale, but only to the extent it was otherwise valid under state law.

After considering the lengthy record in this case, the Court concludes that there is no legal or factual basis to set aside the October 20, 2005 Orders dismissing the case and granting BA Mortgage's motion to annul the automatic stay and validate the foreclosure sale. Debtor has been represented by able counsel in this case and has had numerous opportunities to make the required plan and mortgage payments. Unfortunately, the amounts are too large for the debtor to propose a feasible plan. Accordingly, debtor's motion must be and is hereby denied. Debtor may communicate and work with BA Mortgage and the IRS outside of bankruptcy to determine if there is any consensual basis upon which he can retain the Property, but there is nothing more than can be done in the context of any bankruptcy proceeding.

IT IS SO ORDERED, this _____ day of November, 2005.

JOYCE BIHARY

UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

Bill J. Miller

3280 Herrnhut Road
Lithonia, GA 30338

Sylvia D. Miller

3280 Herrnhut Road
Lithonia, GA 30338

James H. Bone

Standing Chapter 13 Trustee
Suite 1100, The Equitable Building
100 Peachtree Street, NW
Atlanta, GA 30303-1901

Kenneth Mitchell

Giddens, Davidson & Mitchell P.C.
Suite 300-B
5000 Snapfinger Woods Drive
Decatur, GA 30034

David C. Whitridge

Morris, Schneider & Prior, L.L.C.
1587 Northeast Expressway
Atlanta, GA 30329